RECORD AND BRIEFS

FILED
JUL 31 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 17-21

In the Supreme Court of the United States

FANE LOZMAN,
Petitioner,

v.

CITY OF RIVIERA BEACH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE FIRST AMENDMENT FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus First Amendment Foundation is a nonprofit organization dedicated to promoting government openness and transparency throughout Florida, at both the state and local government levels. In addition to working with volunteers to audit government compliance with open meetings, public records, and other "sunshine" laws, the Foundation educates government officials, journalists, and the public about citizens' rights to obtain information from their governments. The Foundation also operates a hotline to answer questions about open government laws, handling more than 150 inquiries per month. Some of these inquiries come from members of the public expressing concerns about government retaliation or intimidation after exercising their right to request information.

A number of the Foundation's members have reported facing intimidation or retaliation for exercising their First Amendment rights. For instance, one member told the Foundation that she submitted a public records request at a police station as part of one of the Foundation's compliance audits—and was followed home by the police.

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[1] Counsel for both parties received timely notice of the Foundation's intent to file this brief and have consented to its filing. Each party's written consent to the filing of this brief has been submitted with the Clerk of the Court pursuant to Rule 37.2. In accordance with Rule 37.6, the Foundation confirms that no counsel for any party authored this brief in whole or in part, and that no person other than the Foundation's counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Another member reported to the Foundation that he requested public records, and went to City Hall to pick them up—and was arrested for trespass upon arriving.

In light of its mission and the reported experiences of its members, the Foundation has a strong interest in the public's ability to exercise its First Amendment rights, such as the right to request information from government officials. Accordingly, the Foundation has an interest in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari presents the important question whether the presence of probable cause, standing alone, bars a First Amendment retaliatory arrest claim. Because police have broad discretion to arrest citizens for even minor infractions, retaliatory arrests in response to protected First Amendment activity are a serious problem. This problem is not a hypothetical one: the court of appeals found petitioner Lozman's evidence that he was arrested in retaliation for protected speech to be "compelling," Pet. App. 10a, and there are numerous examples of First Amendment retaliatory arrest cases from around the country.

The rule set forth in the decision below effectively insulates municipalities and officials from liability for most claims seeking redress for such government retaliation. The danger of being arrested in retaliation for engaging in protected speech threatens to chill the exercise of core First Amendment rights

such as questioning or otherwise criticizing the government. The potential chilling effect is especially acute in smaller towns and cities across America, where vocal critics often continuously interact with local officials and are therefore at risk of retaliation. This Court's intervention is necessary to protect a citizen's ability to seek redress where she has been subjected to an unconstitutional retaliatory arrest, and to prevent the continued chilling of First Amendment expression in jurisdictions where the "no probable cause" rule is in place.

In view of the importance of the question presented, this Court should grant review to resolve the circuit conflict identified in the petition. This case is an ideal vehicle for the Court to do so, and to establish that probable cause, standing alone, does not automatically defeat a First Amendment claim for retaliatory arrest.

ARGUMENT

I. Retaliatory Arrests In Response To Protected First Amendment Activity Are A Significant, Recurring Problem.

The First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Reflecting this "profound national commitment" to the freedom of expression, *id.*, "the law is settled that as a general

matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out," *Hartman v. Moore*, 547 U.S. 250, 256 (2006). The ability to bring a damages action when such "retaliatory actions" occur, *id.*, serves as both an important check on government abuse, and an opportunity—often the only one—for the individual to vindicate her rights. *See, e.g.*, 42 U.S.C. § 1983; *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978).

The decision below severely limits the effectiveness of this check, barring a plaintiff from stating a claim for retaliatory arrest where there is probable cause that she has committed *any* infraction. Given the myriad federal, state, and local laws and regulations that govern everyday activities, most of us routinely—and unintentionally—commit minor infractions. Under the decision below, probable cause to believe a person has committed any of these infractions will immunize a retaliatory arrest from First Amendment challenge, leaving citizens with no effective means of addressing the chilling effect such arrests create.

A. Because Citizens Can Be Arrested For Minor Infractions, Allowing Probable Cause To Bar First Amendment Retaliatory Arrest Claims Effectively Insulates Municipalities And Officials From Liability.

Given the wide range of offenses that can lead to arrest in today's world, the decision below effectively

immunizes municipalities and officials against First Amendment retaliatory arrest claims.

1. Most individuals, often inadvertently, commit some sort of arrestable infraction on a regular, if not daily, basis. Consider these observations about the typical American traffic code:

> There is no detail of driving too small, no piece of equipment too insignificant, no item of automobile regulation too arcane to be made the subject of a traffic offense. Police officers in some jurisdictions have a rule of thumb: the average driver cannot go three blocks without violating some traffic regulation. . . . For example, in any number of jurisdictions, police can stop drivers not only for driving too fast, but for driving too slow. In Utah, drivers must signal for at least three seconds before changing lanes; a two second signal would violate the law. In many states, a driver must signal for at least one hundred feet before turning right; ninety-five feet would make the driver a[n] offender. . . . Many states have made it a crime to drive with a malfunctioning taillight, a rear-tag illumination bulb that does not work, or tires without sufficient tread. They also require drivers to display not only license tags, but yearly validation stickers, pollution control stickers, and safety inspection stickers; driving

> without these items displayed on the vehicle in the proper place violates the law.

David A. Harris, *"Driving While Black" and All Other Traffic Offenses*, 87 J. CRIM. L. & CRIMINOLOGY 544, 557–59 (1997) (citations omitted).

Such intricate regulatory systems are not unique to the traffic code—thousands of federal and state laws criminalize a wide range of activity. *See, e.g.*, *Overcriminalization*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, https://www.nacdl.org/overcrim/ (last visited July 26, 2017) (observing that there are "over 4,450 crimes scattered throughout the federal criminal code, and untold numbers of federal regulatory criminal provisions"); *Overcriminalization*, RIGHT ON CRIME, http://rightoncrime.com/category/priority-issues/overcriminalization/ (last visited July 26, 2017); *id.* (observing that Texas alone has more than 1,700 crimes on the books).

Officers have wide discretion under state and federal law to arrest individuals for these offenses, however minor. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 323, 344 & nn. 12–13, 355–60 (2001); U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEP'T 82 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (discussing the Ferguson Police Department's "aggressive enforcement of even minor municipal infractions"); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1359 (2012) ("The breadth of street crime

violations—loitering, trespassing, gang injunctions, and the like—confers vast power on urban police that permits widespread arrests for petty offenses. . . . Incarceration and increasingly harsh punishment can flow from the pettiest of behaviors, triggered by the slightest impulse on the part of the police to arrest."). The sheer breadth of police discretion gives rise to a significant danger that officers or other officials will sometimes decide to arrest individuals for improper reasons—including in retaliation for their protected speech.

2. That danger is hardly hypothetical, as illustrated by retaliatory arrest cases from around the country. For example, with some frequency, individuals are arrested as a result of disagreements with police in connection with the exercise of their First Amendment rights:

- In *Allen v. Cisneros*,[2] 815 F.3d 239 (5th Cir. 2016), a Houston street preacher alleged that he had been subjected to two retaliatory arrests in violation of his First Amendment rights. *Id.* at 241–43. Both times, he was arrested after preaching on the street carrying a shofar, which "is a trumpet-like instrument made from a ram's horn" that is "used in Judaism to mark the holidays of Rosh Hashanah and Yom Kippur." *Id.* at 241–43 & n.1. The preacher and the defendants had

[2] In summarizing this and other cases, the Foundation sets out the facts as laid out in the court order or opinion. As many of these orders and opinions discuss motions to dismiss or motions for summary judgment, the facts are generally described in the light most favorable to the plaintiff.

differing versions of the events that transpired, with the preacher alleging that, each time, he had been arrested after trying to film the police. *See id.* at 242–43. But because the plaintiff's "possession of his shofar independently provided reasonable suspicion for his detention" based on a "city ordinance" that "specifically prohibited 'carry[ing] or possess[ing] while participating in any demonstration' objects that 'exceed three-quarters inch in their thickest dimension,'" *id.* at 245 (alterations in original), the Fifth Circuit reversed the district court's denial of summary judgment in the officers' favor. *See id.* at 245–47.

- In *Hoyland v. McMenomy*, 185 F. Supp. 3d 1111 (D. Minn. 2016), the plaintiff awoke to sounds of the police arresting his wife outside their home. *Id.* at 1116. He opened the door and informed the police that his wife had a physical disability; he also began filming the encounter. *Id.* The officers commanded him to drop his camera and go back inside. *Id.* at 1117. After the plaintiff stayed in his doorway and continued to attempt to communicate his wife's disability to the officers, he was arrested for obstruction of legal process. *Id.* at 1117–18. After a Minnesota state court dismissed the charges due to lack of probable cause, the plaintiff brought a First Amendment retaliatory arrest claim. *Id.* at 1119. The district court denied the officers' motion for qualified immunity, pointing out that the state court had already determined that the officers

lacked probable cause. *Id.* at 1122–28 & n.20. The court emphasized, however, that the officers would be later entitled to qualified immunity if they could demonstrate that they had *arguable* probable cause to support the arrest, a lower bar. *Id.* at 1122–23, 1128.

- In *Baldauf v. Davidson*, No. 1:04-cv-1571-JDT-TAB, 2007 WL 2156065 (S.D. Ind. July 24, 2007) (hereinafter *Baldauf II*), the plaintiff was arrested after a confrontation with a police officer at a convenience store. *Id.* at *1. At one point, the officer pointed a finger at the plaintiff, but she pushed it aside. *Id.* After the confrontation, the officer told the plaintiff that "he was not going to arrest her and that she could leave." *Id.* But as the plaintiff "was leaving, she told [the officer] that she was going to file a complaint with" the police chief. *Id.* The officer later arrested her when she was talking to the police chief at the station. *Id.* The district court determined that, although the plaintiff may have had an "otherwise worthy [retaliatory arrest] claim," it was barred by the existence of probable cause that she had committed battery. *Id.* at *1, *4; *see also Baldauf v. Davidson*, No. 1:04-cv-1571-JDT-TAB, 2007 WL 1202911, at *4 (S.D. Ind. Apr. 23, 2007) (hereinafter *Baldauf I*) (existence of probable cause as to battery). The court accordingly granted summary judgment in the defendants' favor on this claim. *Id.* at *6.

- In *Laning v. Doyle*, No. 3:14-cv-24, 2015 WL 710427 (S.D. Ohio Feb. 18, 2015), a 63-year-old woman was pulled over in a strip mall parking lot for a traffic violation. *Id.* at *1. She did not immediately pull over once the officer "activated the lights on his police cruiser"; instead, she kept driving through the parking lot and parked outside of her office. *Id.* After the plaintiff stepped out of her car, the defendant officer pointed his taser at her. *Id.* "[S]he asked why she was being detained," but he did not respond and instead forcefully arrested her, allegedly in retaliation for her question. *Id.* at *1, *14. On the way to the jail, the plaintiff alleged that the officer drove erratically—doing donuts in a parking lot—and verbally taunted her. *Id.* at *1. The court held that while it was not clearly established that the officer lacked probable cause to arrest the plaintiff for failing to comply with an officer based on her failure to immediately pull over, *id.* at *7–9, the allegations viewed in the light most favorable to her could support a finding that the officer retaliated against her for exercising her First Amendment right to "question[] why he had pulled her over," *id.* at *15.

Retaliatory arrests are not limited to the context of police confrontations. As petitioner's case and the examples below demonstrate, such arrests often target citizens for criticizing the government:

- In *Roper v. City of New York*, No. 15 Civ. 8899 (PAE), 2017 WL 2483813 (S.D.N.Y. June 7,

2017), two photographers filed First Amendment retaliatory arrest claims after being arrested during a Black Lives Matter protest in Times Square. *Id.* at *1, *3. One plaintiff was arrested "for standing in the street" after being told by police "to move from the street to the sidewalk"—but could not do so because police barricades and other officers were in the way. *Id.* at *1. The second plaintiff, a photojournalist, had crossed the street to find a restroom—but was arrested for disorderly conduct after he failed to use a crosswalk, even though police were blocking the crosswalks. *Id.* Because the police had probable cause to arrest the "plaintiffs for violating . . . traffic rules" relating to sidewalk use, the plaintiffs' retaliatory arrest claims had to be dismissed under Second Circuit law, "even assuming that compliance with the . . . [police's] dispersal orders was not realistically possible." *Id.* at *3–5.

- In *Morse v. San Francisco Bay Area Rapid Transit District (BART)*, No. 12-cv-5289 JSC, 2014 WL 572352 (N.D. Cal. Feb. 11, 2014), a journalist brought a retaliatory arrest claim after he was arrested by a Bay Area Rapid Transit ("BART") Deputy Police Chief while documenting a peaceful protest. *Id.* at *1. The plaintiff had a history of writing and publishing articles critical of the BART police, even "openly mock[ing] and ridicul[ing] the agency and its officers." *Id.* at *1–4, *9. By the time of the plaintiff's arrest, he was "'personally acquainted' with leaders of the BART organiza-

tion," leading the police to, before the protest where the plaintiff was arrested, distribute flyers identifying him and give orders to arrest him if he "incite[d] a riot or act[ed] in a criminal manner." *Id.* at *2, *4. Ultimately, the plaintiff was the sole member of the media arrested for standing in front of a fare gate—even though his conduct was indistinguishable from that of other journalists at the protest. *Id.* at *6–7, *9–10. Although the officer had probable cause to arrest the plaintiff for hindering the operation of a rail line, the district court, after identifying the ample evidence suggestive of defendants' retaliatory motive, denied the defendants' motion for summary judgment on the plaintiff's retaliatory arrest claim under Ninth Circuit law. *Id.* at *9–15.

- In *Fernandes v. City of Jersey City*, Civ. No. 2:16-cv-07789-KM-JBC, 2017 WL 2799698 (D.N.J. June 27, 2017), one plaintiff brought a First Amendment retaliation claim after being forcibly removed from a City Council meeting at the mayor's request. *Id.* at *3, *9–11. A few months before that removal, the plaintiff and his wife (also a plaintiff in the action, but who was not subjected to a retaliatory arrest) obtained a construction permit and began to remodel their home. *Id.* at *2. But within days, City officials came onsite and ordered them to stop, even though by that point the siding had already been removed, "resulting in weather damage" when they were unable to continue the project. *Id.* at *1–2. The plaintiff began attending City Council meetings and

other public meetings to complain about the City's conduct. *Id.* at *3. "At one such meeting," the City Council President "accosted" the plaintiff; at another, the plaintiff was forcibly removed at the mayor's request even though, according to the plaintiff, he had not done anything to cause a disturbance. *Id.* The defendants argued that they did, in fact, have probable cause to remove him for causing a disturbance. *Id.* at *11. The court concluded that there was a genuine issue of material fact as to the existence of probable cause, and denied defendant officers' motion to dismiss on qualified immunity grounds accordingly. *Id.* at *11, *15–16.

- In *Galarnyk v. Fraser*, 687 F.3d 1070 (8th Cir. 2012), a bridge safety consultant criticized a government agency on a number of national news networks after a bridge collapsed in Minnesota, and later visited the collapse investigation command center to discuss his concerns with officials. *Id.* at 1071–72. After meeting with an official in one of the command center's trailers, he entered another trailer without permission and further criticized the government. *Id.* at 1072. He was asked to leave, and did. *Id.* But he was stopped by a law enforcement officer after he had begun to leave the site, and was arrested shortly thereafter. *Id.* at 1073. Despite the plaintiff's allegations that the officer who stopped him repeatedly commented to a colleague that the plaintiff needed to be "locked up" for speaking out about the bridge collapse on national

> television, *id.* at 1073, the Eighth Circuit affirmed the dismissal of the safety consultant's claim on summary judgment because there was probable cause that he had trespassed, *id.* at 1076.

The sheer number of minor infractions—carrying a shofar, failing to step onto a sidewalk, blocking a fare gate, or entering a trailer—for which these plaintiffs were arrested demonstrates that any given retaliatory arrest will likely be supported by probable cause that the arrestee committed some offense, however minor. The rule that the existence of probable cause bars the plaintiff's claim entirely thus effectively immunizes potentially retaliatory arrests from judicial scrutiny.

3. The breadth of the immunity conferred by the decision below is confirmed by two additional, significant consequences of the Eleventh Circuit's rule.

First, because probable cause is an objective inquiry, defendants can raise multiple theories of probable cause in the hope that the court accepts one, pointing to alleged infractions that were not even on the officer's mind, or communicated to the plaintiff, at the time of arrest. So in *Roper*, while the officers had originally arrested the plaintiffs for disorderly conduct at the Black Lives Matter protest, the court upheld the existence of "probable cause to arrest" them "for offenses relating to pedestrian traffic." 2017 WL 2483813, at *3–4. The court explained that "the relevant inquiry is 'whether probable cause existed to arrest for *any* crime,' not necessarily for the

crimes cited by the officers or ultimately charged." *Id.* at *3 (emphasis added) (quoting *Marcavage v. City of N.Y.*, 689 F.3d 98, 109 (2d Cir. 2012)). And so the existence of probable cause that the plaintiffs had "violat[ed] . . . traffic rules" precluded their claim as a matter of law. *Id.* at *3–4.

Petitioner Lozman's case serves as a prime example of the troubling consequences of allowing probable cause to be a moving target. Lozman filed a lawsuit against Respondent City of Riviera Beach alleging the violation of government transparency laws, Pet. App. 17a—quintessentially protected speech under the First Amendment, *see Bill Johnson's Rests. Inc. v. NLRB*, 461 U.S. 731, 741 (1983). A few months later, when Lozman tried to speak at a City Council meeting, a Councilmember who had previously stated a desire to "intimidate" Lozman in response to the lawsuit ordered Lozman's arrest. Pet. App. 3a–4a. Lozman was then charged with two crimes: disorderly conduct and resisting arrest. The prosecutor never pursued the charges. Pet. App. 4a.

In the course of this lawsuit challenging that retaliatory arrest, the district court "expressed doubt" that the City would be able to demonstrate at trial that there was probable cause as to *either* offense. *See* Pet. 8–9 (citing record evidence). So the City switched gears *during trial*, alleging probable cause for a different offense that had not been raised up to that point: disturbance of a lawful assembly. *See id.* (citing record evidence). The Eleventh Circuit accepted that the existence of probable cause as to that third, new offense meant that Lozman's

retaliatory arrest claim failed as a matter of law. Pet. App. 7a–9a, 11a. In the face of clear evidence that City officials acted with retaliatory intent and a significant question whether there was probable cause for the offenses for which petitioner was actually arrested, the City was able to defeat petitioner's claim by testing theories of probable cause until it hit on one that stuck.

Second, the Eleventh Circuit's "no probable cause" rule bars First Amendment retaliatory arrest claims in the face of probable cause even where there is strong evidence of a retaliatory motive—as happened below. Petitioner Lozman's arrest was just one event in a longer string of reprisals committed by the City, much of which is documented in *Lozman v. City of Riviera Beach*, 568 U.S. 115, 118–19 (2013), and discussed in the petition, *see* Pet. 4–5. What is more, the record below included Councilmember Wade's comments stating, in a closed-door session, that she wanted to "intimidate" petitioner and send him a "message" because of his lawsuit against the City. Pet. App. 3a, 18a. Yet even though the Eleventh Circuit concluded that petitioner "seems to have established a sufficient causal nexus between Councilperson Wade and the alleged constitutional injury of his arrest," *id.* at 10a, it held that the existence of probable cause rendered that conclusion irrelevant.

And so it is that the *Roper* plaintiffs could not pursue a retaliatory arrest claim even though one plaintiff, before he was arrested at the Black Lives Matter protest, "heard an NYPD supervisor instruct his officers to '[j]ust take somebody and put them in

handcuffs.'" 2017 WL 2483813, at *1 (alteration in original). And that Galarnyk, the plaintiff bridge consultant, could not survive summary judgment on his retaliatory arrest claim despite the fact that one officer asserted repeatedly that Galarnyk needed to be "locked up" for sharing his views about the bridge collapse on national television. *Galarnyk*, 687 F.3d at 1073. And that the plaintiff involved in a confrontation with a small-town police officer could not withstand summary judgment on her retaliatory arrest claim, even though the officer had told her following the confrontation that he was not going to arrest her, but changed course after she threatened to, and did, report the officer to the police chief (who was also the town marshal). *Baldauf II*, 2007 WL 2156065, at *1, *4; *Baldauf I*, 2007 WL 1202911, at *1.

In contrast, because journalist Morse was arrested in California, his First Amendment retaliatory arrest claim against the BART Police could proceed despite the existence of probable cause for interfering with a rail line. *Morse*, 2014 WL 572352, at *11–15. But if he had been arrested in Florida instead, his claim would have failed as a matter of law—notwithstanding Morse's presentation of evidence that BART police officers knew of inflammatory articles he had written about them; had circulated flyers with an image of his face prior to the protest; and preemptively ordered his arrest if he did anything criminal. *Id.* at *3–4.

Under the more nuanced rule that petitioner advocates, the existence of probable cause would still be relevant evidence of the defendant's lack of

retaliatory intent. *See* Pet. 25. But the existence of probable cause, without more, would not prevent a plaintiff who is able to establish that she was in fact arrested in retaliation for her speech from seeking redress for that constitutional injury.

B. Immunizing Municipalities And Officials From First Amendment Retaliatory Arrest Claims Risks Chilling The Exercise Of First Amendment Rights.

It is beyond dispute that the potential to be arrested for engaging in protected speech is likely to deter First Amendment activities. Indeed, the very reason that "[o]fficial reprisal for protected speech" is prohibited is because "it threatens to inhibit exercise of the protected right." *Hartman*, 547 U.S. at 256 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998)); *Ford v. City of Yakima*, 706 F.3d 1188, 1194 (9th Cir. 2013) ("[A] person of ordinary firmness would be chilled from future exercise of his First Amendment rights if he were booked and taken to jail in retaliation for his speech."). And such chilling extends beyond the target of government reprisal; retaliation against "one tells the others that they engage in protected activity at their peril." *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1419 (2016).

An individual's ability to bring a First Amendment retaliatory arrest claim against vindictive government officials serves as an important check on such reprisal and the resultant chilling of protected activity. *See generally Morse*, 2014 WL 572352 (plaintiff journalist's claim for retaliatory arrest by

BART police could move forward); *Hoyland*, 185 F. Supp. 3d 1111 (husband's claim for retaliatory arrest after he had tried to tell the police that his wife was disabled could move forward); *see also Naveed v. City of San Jose*, No. 15-cv-05298-PSG, 2016 WL 2957147, at *1, *5–6 (N.D. Cal. May 23, 2016) (permitting First Amendment retaliatory arrest claim to proceed, despite the existence of probable cause to support the arrest, where the plaintiffs were arrested after attempting to film the police; and concluding that defendant officers' alleged "conduct would chill a person of ordinary firmness from future First Amendment activity"). Such suits help deter retaliatory conduct, making it less likely to happen in the future. And from the plaintiff's perspective, an-after-the-fact damages suit is generally the only means she has to vindicate her rights after a retaliatory arrest.

But in jurisdictions where probable cause bars a First Amendment retaliatory arrest claim as a matter of law, this check is effectively absent. Again, this case crystallizes the issue: the decision below functionally gives officials carte blanche to order a citizen arrested for the express purpose of "intimidat[ing]" him into no longer criticizing the government, Pet. App. 3a. Other residents of the City of Riviera Beach—not to mention other citizens, including Foundation members, across the State—could very well conclude that the danger of being arrested (and being taken to the police station, booked, and jailed) is simply too high a price to pay for the privilege of commenting on government policies or otherwise engaging in protected activity.

That chilling effect is precisely what the First Amendment guards against.

This risk of self-censoring is particularly acute in interactions between individuals and their local governments—especially in smaller cities and towns. As this case demonstrates, in these smaller towns, citizens are much likelier to interact with their governments and government officials on a regular basis. And government critics are more likely to be known to their government officials. It is no coincidence that in petitioner's case, and in a number of the cases discussed above, the retaliatory arrests at issue were effected by local government officials in smaller cities and towns. *See, e.g.*, Public Data, GOOGLE, goo.gl/eAu6bn (last visited July 26, 2017) (Riviera Beach, Florida, where petitioner Lozman was arrested, has a population of 34,244; Pittsboro, Indiana, where plaintiff Baldauf got into an altercation with a police officer in a convenience store, has a population of 3,283; Huber Heights, Ohio, where 63-year-old plaintiff Laning was pulled over, arrested, and forced to ride in a police car while the officer did "donuts," has a population of 38,019; Rosemount, Minnesota, where plaintiff Hoyland was arrested after trying to inform the police of his wife's disability, has a population of 23,911).

II. This Court Should Resolve The Circuit Conflict Concerning Whether Probable Cause Bars A Retaliatory Arrest Claim, And This Case Presents An Ideal Vehicle For Doing So.

A. As the petition demonstrates and the decisions discussed above confirm, the question whether the existence of probable cause bars a challenge to a retaliatory arrest is an important one on which the lower courts have diverged. Without this Court's intervention, the circuit conflict will leave both individuals and government officials uncertain as to the law governing retaliatory arrests. *Compare, e.g.*, *Naveed*, 2016 WL 2957147, at *5–6 (declining, based on Ninth Circuit precedent, to dismiss a retaliatory arrest claim despite the existence of probable cause); *Morse*, 2014 WL 572352, at *1, *11–13 (denying the defendant's motion for summary judgment on a retaliatory arrest claim despite probable cause), *with Roper*, 2017 WL 2483813, at *1, *3–4 (dismissing retaliatory arrest claim under Second Circuit law because probable cause existed for jaywalking); *Galarnyk*, 687 F.3d at 1076 (similar, under Eighth Circuit law, in light of probable cause for trespassing), *with Marshall v. City of Farmington Hills*, No. 15-2380, 2017 WL 2380650, at *3, *6–8 (6th Cir. June 1, 2017) (pointing to *Reichle v. Howards*, 566 U.S. 658 (2012), in affirming, on qualified immunity grounds, dismissal of the plaintiff's First Amendment retaliatory arrest claim, due to the existence of probable cause); *Dukore v. District of Columbia*, 799 F.3d 1137 (D.C. Cir. 2015) (similar).

B. Petitioner Lozman's case presents several features that make it the ideal vehicle for resolving this ongoing confusion among lower courts: (1) the only defendant—Respondent City of Riviera Beach—is a municipality, such that qualified immunity is unavailable; (2) the existence of probable cause is undisputed; and (3) there is no question that Lozman's conduct leading to his arrest—his filing of a lawsuit against the City alleging illegal conduct—is protected by the First Amendment. Thus, unlike in *Reichle v. Howards*, 566 U.S. 658 (2012), there are no antecedent questions that could prevent the Court from reaching the question presented. The Court should take this opportunity to resolve the disagreement in the lower courts, and it should hold that the existence of probable cause does not bar a First Amendment retaliation claim as a matter of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 31, 2017